IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1241

PEPI, INC., PHILIPS ELECTRONIC INSTRUMENTS, INC. and NORTH AMERICAN PHILIPS CORPORATION,

Petitioners,

v.

PITCHFORD SCIENTIFIC INSTRUMENTS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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OPINIONS BELOW

The Judgment Order of the Court of Appeals for the Third Circuit was entered without opinion on September 7, 1978. It is unpublished. The Judgment Order affirms two opinions of the United States District Court for the Western District of Pennsylvania reported at 435 F. Supp. 685 and 440 F. Supp. 1175, although only the opinion at 435 F. Supp. 685 is at issue in the Petition. These followed an earlier opinion of the Court of Appeals for the Third Circuit at 531 F.2d 92. Petitions for writs of certiorari to review that opinion were filed and denied at 426 U.S. 935. The Judgment Order and the opinion of the United States District Court dated July 13, 1977 are reproduced in the Appendix to the Petition. The opinion of the Third Circuit, although not properly at issue, is also reproduced in the Appendix to the Petition.

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether, in this price fixing case involving territorial allocations among competitors, the District Court erred in determining that this Court's opinion in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) was inapposite?

COUNTERSTATEMENT OF THE CASE

Petitioners PEPI, Inc., Philips Electronic Instruments, Inc. and North American Philips Corporation (hereinafter collectively referred to as "Philips") are related companies engaged in the importation, manufacture and distribution of scientific, analytical and industrial x-ray and associated equipment. Philips is a dominant factor in the industry, accounting for 25% to 40% of the United States market in each of its product lines. (R. 3885a, 4116a) 531 F.2d at 100, n.15 (24a).[1]

In 1945 Arthur H. Pitchford was appointed the first dealer for Philips products in the United States. 531 F.2d at 101 (27a). In 1960 the business was incorporated under the name of Pitchford Scientific Instruments Corporation (hereinafter "Pitchford"), the respondent herein. As a dealer, Pitchford purchased products from Philips for resale to its customers, the ultimate users, under a series of annual dealership contracts. *Id.*

Originally, Pitchford was free to sell anywhere in the United States. *Id.* Beginning in 1955, however, ter-

1. References to the Appendix to the Petition are cited as ....a. Record references to the Appendix filed with the Court of Appeals are cited as R. ....a.

ritorial clauses were included in the Philips dealership contracts, specifically precluding Pitchford and the other dealers from selling outside their assigned territories. 531 F.2d at 101 (27a). Over the years Pitchford's territory was steadily reduced, in spite of attempts by Pitchford to have it enlarged. *Id.* (28a). By 1967, Pitchford was permitted to sell only in the State of West Virginia, part of Pennsylvania and four counties in Maryland. (R. 3723a-3725a). Pitchford's contracts prohibited solicitation or sale outside that territory. 531 F.2d at 101, 102 (27a).

In addition to selling through dealers, Philips also sold the identical products through Philips-owned branch outlets selling at the same level of distribution as the dealers. 531 F.2d at 101 (28a). The restricted Pitchford territory was surrounded completely by the territories of five Philips branch offices. (R.3013a, 3022a). By 1970, the majority of the United States was in fact covered not by dealers but by Philips' branch offices. 531 F.2d at 101-102 (28a). Philips policed the territorial division for the dealers and branch offices, responding to complaints by both. It actively sought to prevent entry by one into the other's territory. 531 F.2d at 102-104 (28a-33a). On at least one occasion, a dealer was expressly threatened with termination for violations of territorial policy. 531 F.2d at 103 (28a-29a).

In addition to policing territories, Philips fixed the prices at which Pitchford and the dealers could resell Philips products and engaged in policies of exclusive dealing and full-line forcing. 531 F.2d at 99-101 (19a-27a).

By letter dated August 6, 1970, Philips terminated Pitchford's dealership effective September 10, 1970. 531

F.2d at 96 (14a). On December 24, 1970, Pitchford filed this suit in the Western District of Pennsylvania, charging Philips with territorial restrictions, price fixing, exclusive dealing, full-line forcing and unlawful termination of its dealership. 531 F.2d at 96 (14a).

Following a trial of almost six weeks, the jury on March 29, 1974 returned its verdict on special interrogatories. *Id.* It found that Philips had engaged in illegal territorial restrictions, price fixing, full-line forcing and exclusive dealing, and that such conduct resulted in the eventual termination of the dealership. *Id.* It found that termination was not motivated predominately by legitimate business reasons. (R. 42a). Judgment was entered accordingly. Philips appealed.

The Court of Appeals for the Third Circuit held that the evidence established both vertical and horizontal territorial restrictions. 531 F.2d at 104 (33a). It found on the record an explicit agreement between Philips and each of its dealers to divide territories, and further, that Philips policed the system for the benefit of both dealers and branches. 531 F.2d at 103-104 (33a-34a). Sufficient evidence had been presented to support the finding by the jury that Philips' pricing policies constituted a violation of Section 1 of the Sherman Act. 531 F.2d at 98 (20a). Further, there was evidence that during the damage period Philips had engaged in policies of exclusive dealing and full-line forcing. 531 F.2d at 99-101 (22a-27a).

Following the denial of petitions for rehearing and for writs of certiorari, 426 U.S. 935 (1976), the case was remanded to the District Court for retrial to deter-

mine the amount of damages resulting from territorial restrictions and termination.[2]

Just prior to the retrial, this Court announced its decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). Allegedly on the basis of that decision, Philips petitioned the Court of Appeals to recall its mandate. The court refused to do so, instead, intructing the District Judge to make the determination in the first instance as to whether there was any inconsistency between the decision in *Sylvania* and the Court of Appeals' prior opinion. (51a-52a).

The District Judge determined that there was no inconsistency. He distinguished the two cases on a number of grounds. First, *Sylvania* dealt only with vertical restrictions, while in this case a horizontal allocation of territories among competitors, a *per se* violation, had been proved. 435 F. Supp. at 688 (58a). Second, the *Sylvania* restraint was a location clause, a vendor restriction; Pitchford involved a vendee restriction of more serious economic impact. *Id.* (59a). Third, *Sylvania* concerned itself only with non-price restrictions. Philips' territorial restrictions, on the other hand, were found to be ancillary to, and part and parcel of, a comprehensive price fixing scheme. 435 F. Supp. at 688-689 (59a-61a). Lastly, *Pitchford* had in fact been tried under a rule of reason standard. Philips had been permitted to offer all the testimony it desired to prove its restraints were reasonable and justified by the nature of the products, the alleged danger to the public and the

2. As the jury had returned a lump-sum verdict, remand was necessary to assess the amount of territorial and termination damages.

need for service. 435 F. Supp. at 689 (61a-62a). Had the case been tried under *Sylvania,* the outcome would have been no different. 435 F. Supp. at 689 (61a-62a).

Finding *Sylvania* to be inapposite, the District Judge denied Philips' motions and trial proceeded. (62a).

Following a retrial of almost two weeks on the issue of damages, the second jury returned its verdict in favor of Pitchford and judgment was entered accordingly. After denial of its motions for judgment n.o.v. or a new trial, Philips appealed. Following oral argument on September 7, 1978, the Court of Appeals for the Third Circuit, by Judgment Order bearing that same date, affirmed the opinions of the District Court. (75a-76a). Philips' petition for rehearing was denied (77a-78a) and a Petition to this Court followed.

REASONS FOR DENYING THE WRIT

The Petition is without merit. In spite of Philips' herculean efforts to manufacture an issue for review, none exists. This litigation was decided correctly on the basis of its own particular facts. Unless this Court is prepared to ignore those facts, upon which two juries, the United States District Court and the United States Court of Appeals for the Third Circuit decided this case, the Petition must be denied. The decisions below are consistent with the holdings of this Court, including the holding in *Sylvania.* The decisions below raise no conflict between circuits. Nor do they raise any issue of importance or precedent under federal law which this Court ought to review.

I. This Litigation Was Decided On Its Own Particular Facts. The Decisions Below Are Consistent With The Holdings Of This Court, Including The Holding in Sylvania.

This is a price fixing case and in 1975 the Court of Appeals for the Third Circuit so held.

> Sufficient evidence was presented to support a finding by the jury that PEI's [Philips'] pricing policies constituted a violation of section 1 of the Sherman Act. . . . [T]here was enough evidence for the jury to find the intent requisite to the antitrust violation. [citations omitted] 531 F.2d at 98 (20a-21a).

Philips' petition for a writ of certiorari having been denied by this Court, 426 U.S. 935 (1976), that holding stands. The existence of price fixing is no longer open to dispute. It must be conceded.

This fact was confirmed by the subsequent opinion of the District Judge.

> Even on a printed record, without being able to see defendant's vice-president in charge of sales attempt to foist the blame for distribution of price directions to dealers upon the mailing clerk, (Tr. 2620-24) the Court of Appeals squarely found that the evidence supported a finding of price fixing. . . . The fact that plaintiff failed to prove loss or damage attributable to the price-fixing violation . . . does not detract from the integration of price-fixing and territorial restrictions characterizing the defendant's sales practices of which both types of restraint formed part and parcel. [citations omitted]. 435 F. Supp. at 689 (60a-61a).

Price fixing arrangements, whether horizontal, *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940), or vertical, *Dr. Miles Medical Co. v. Park & Sons Co.,* 220 U.S. 373 (1911), are *per se* illegal. Given the existence of price fixing in this case, it does not matter whether the territorial restraints employed below are classified as horizontal or vertical. Horizontal agreements to divide and allocate markets are, of course, illegal *per se. United States v. Topco Associates, Inc.,* 405 U.S. 596 (1972); *Addyston Pipe & Steel Co. v. United States,* 175 U.S. 211 (1899). But even purely vertical restraints are *per se* unlawful if ancillary to price fixing or if price fixing is a part of the whole distribution system. *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365, 373 (1967); *White Motor Co. v. United States,* 372 U.S. 253, 260 (1963); *United States v. Bausch & Lomb Co.,* 321 U.S. 707, 720 (1944).

Price fixing was integral to and infected the entire distribution system. The resale price of every product sold by the dealers was fixed by a Pricing Committee established by Philips and staffed by its top corporate officers. (R. 401a-403a, 1729a). 531 F.2d at 98 (19a). For most of its major product lines, Philips was considered the "Cadillac" of the industry and it set resale prices accordingly. (R. 599a). Pitchford was not permitted to resell below the price fixed by Philips. (R. 805a) 531 F.2d at 98 (19a).

The territorial restraints below were ancillary to this price fixing scheme and the District Judge so held.

> [I]t is manifest that defendant's territorial restrictions were part and parcel of a comprehensive price-fixing policy. . . . [T]he defendants' restraints "were ancillary to an illegal price fixing scheme." 435 F.Supp. at 689 (60a).

This determination is supported fully by the record. The Court of Appeals had been explicit.

> Further, there is evidence that, in cases where a prospective customer asked for bids from various PEI dealerships in order to obtain the best price, PEI encouraged the dealers outside the territory of the customer to quote prices higher than the home dealer. A request for bids from an Hawaiian hospital was forwarded by PEI to its dealers around the country with this suggestive paragraph attached:
>
> [VWR, the home dealers] have been in continuing contact with [the hospital] and, of course, are in a position to provide service in Hawaii. ***We assume that other dealer organizations will be***

> *forced to quote additional monies for the travel expenses associated with installation of* [the equipment] *in the islands.* This is, of course, a matter of personal concern for individual dealer offices. 531 F.2d at 102 (30a).

Thus, even if the territorial restraints below could be classified as purely vertical, the existence of price fixing in this record mandates a finding of *per se* illegality.

The territorial restraints, however, were not vertical. They were horizontal in both substance and form. Through its branch offices, Philips sold the identical products at the same level of distribution as did the dealers. During 1966, for example, the United States was covered by seven Philips branch offices and seven full-line dealers like Pitchford. (R. 3964a). Approximately 50% of all retail sales were made by the branches. (R. 3964a). At the date of Pitchford's termination in 1970, only three full-line dealers remained and the branch offices accounted for more than 75% of such sales. (R. 3991a). 531 F.2d at 101-02 (28a).

During this entire period, the restricted Pitchford sales territory was surrounded completely by the territories of five Philips branch offices located in Philadelphia, Rochester, Cleveland, New York, and Washington, D.C. (R. 3022a, 3887a). Pitchford requested regularly that it be permitted to expand its sales territory. 531 F.2d at 101 (28a). It requested permission to open an office in New York, a Philips branch territory. (R. 2768a, 2908a). Philips would not permit it. (R. 2943a). It requested permission to sell in Ohio, Eastern Pennsylvania and New Jersey, all Philips branch territories. (R. 2768a, 2907a-2908a). Again,

Philips said no. (R. 2942a-2943a). Pitchford wanted to open a Charleston, West Virginia office. (R. 2940a-2941a). Such an office would not be feasible unless Pitchford were permitted to sell in Ohio and Kentucky, Philips branch territories. (R. 2942a). Pitchford was denied permission to sell in those states. (R. 2942a-2943a). Had Pitchford been permitted to expand its sales territory, it would have sold into those Philips branch territories. (R. 2907a-2909a). It was for the customers of those branch offices, among others, that Pitchford and the other dealers would have competed, absent the restraints. This record is replete with evidence as to opportunities to quote or sell outside its territory which Pitchford was forced to refer to a Philips branch office or another dealer. (R. 2775a-2776a, 2814a-2819a, 2934a-2938a, 2990a-2991a, 3743a-3759a). It was to insulate those branch offices and the other dealers from competition that Pitchford was refused permission to expand.

In spite of the fact that Philips, Pitchford and the other dealers were competitors, they entered into explicit annual agreements to divide among themselves the United States market for the sale of Philips scientific and analytical x-ray products at the retail level. 531 F.2d at 104 (33a). Each such agreement contained the following clause:

> 6. The DEALER shall not sell, offer for sale, solicit sales of PRODUCTS nor appoint agents or representatives for such purposes outside the territory set forth in Schedule B. The MANUFACTURER shall not appoint any other DEALER in said territory for the products listed in Schedule A on the reverse side hereof, and indicated as ex-

> clusive products, but reserves the right to sell or otherwise deal with Federal or State government agencies or with national accounts. National accounts are the accounts of such companies as do business in and outside the territory set forth in Schedule B. In cases where the MANUFACTURER deals directly with the ultimate customer, *other than* Federal or State government agencies or national accounts, the DEALER shall receive full credit for such sale and dealer shall assume all the obligations of this agreement. (emphasis supplied) (R. 3723a).

Based on this record, there can be no dispute as to the horizontal nature of the territorial restraints below. It is manifest and the Court of Appeals so held.

> In the present case, there is evidence that PEI [Philips] responded to branch and dealer complaints about sales made without regard to the territorial allocation and actively sought to prevent entry by one dealer into another dealer's territory.... [T]he record reveals an explicit agreement between PEI and each dealer to divide territories. Thus, a horizontal restraint, a *per se* violation of the Sherman Act, could be found on this record, even if the *Schwinn* prohibition of vertical restraints were not dispositive. 531 F.2d at 104 (33a).

This Court denied Philips' petition for a writ of certiorari to review that holding. 426 U.S. 935. Thus, the existence of horizontal territorial restraints is not an issue open to debate. It must be conceded.

Where actors are competitors at the same level of the market structure, the restraint is classified properly as horizontal. *United States v. Topco Associates, Inc.,* 405 U.S. 596, 608 (1972). Agreements among such competitors to divide and allocate markets are illegal *per se. Topco, supra; Addyston Pipe & Steel Co. v. United States,* 175 U.S. 211 (1899). A *per se* standard is likewise appropriate where, as here, a manufacturer seeks to police a division of markets for the benefit of horizontal competitors. *Topco, supra.*

Philips contends that its illegal conduct is insulated from *per se* scrutiny because it is a manufacturer. That position cannot be sustained on either the facts or the law. For the vast majority of the products sold by Philips and the dealers, Philips was not the manufacturer. It simply imported those products from a number of European and American manufacturers and resold to the dealers and through the branches. (R. 561a-571a, 1710a-1715a, 2199a-2200a). Its manufacturing function was almost incidental, involving only a few products. (R. 2199a-2200a). It was nothing more than a wholesaler. As such, Philips wears the cloak of "manufacturer" as did the Emperor his "new clothes."

A competitor on the retail level does not receive a blanket exemption from the application of a *per se* standard by the mere circumstance that it calls itself a manufacturer. The horizontal-vertical distinction is to be made on the basis of substance rather than form. *United States v. Sealy, Inc.,* 388 U.S. 350, 352 (1967).

> We seek the central substance of the situation, not its periphery; and in this pursuit, we are moved by the identity of the persons who act, rather than the label of their hats. *Id.* at 353.

The vertical label placed on a restraint by a defendant seeking to avoid liability will not be dispositive if the essence of that restraint is horizontal. *United States v. Topco Associates, Inc.,* 405 U.S. 596, 608-09 (1972); *United States v. Sealy, Inc.,* 388 U.S. 350, 352 (1967); *United States v. General Motors Corp.,* 384 U.S. 127, 140 (1966).

The cases cited by Philips are simply not on point. (Petition, p. 10-11). Those case are vertical. These restraints were horizontal. This record dictates a different result, as in *Hobart Brothers Co. v. Malcolm T. Gilliland, Inc.,* 471 F.2d 894 (5th Cir. 1973), *cert. denied,* 412 U.S. 923 (1973), where both Gilliland and Hobart, the manufacturer, sold at the same level of distribution. *Id.* at 899.

> While Gilliland could sell Hobart products, it also competed directly with Hobart in products they both manufactured and in accounts that Hobart serviced directly from its home office. Hobart had similar distribution agreements with other distributors. The effect of such agreements was to eliminate competition between Hobart and its distributors. . . . The Hobart distribution agreement, while appearing to allocate territory vertically, in fact, resulted in a horizontal territorial allocation between Hobart and its own distributors. Such an arrangement must be treated as it operated in practice rather than "as arranged by skillful drafting." *Id.*

The key facts upon which this case was decided below were not before the Court in *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36 (1977). Unlike this case, *Sylvania* did not involve either price fixing or horizontal territorial restraints.

> Most important was the jury's rejection of the allegation that the location restriction was part and parcel of a larger scheme to fix prices. *Sylvania,* 433 U.S. at 41, n. 9.
>
> * * *
>
> As in *Schwinn,* we are concerned here only with nonprice vertical restrictions. The *per se* illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy. . . . *Sylvania,* 433 U.S. at 51, n. 18.
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> * * *
>
> There may be occasional problems in differentiating vertical restrictions from horizontal restrictions originating in agreements among the retailers. There is no doubt that restrictions in the latter category would be illegal *per se.* . . . *Sylvania,* 433 U.S. at 58, n. 28.

Citing these critical differences, the District Judge held *Sylvania* to be inapposite. 435 F.Supp. at 688-89 (60a-62a). On this basis alone, that holding is correct.

Other factors, however, point unquestionably to the same result. As a manufacturer, *Sylvania* was a relatively insignificant factor in the marketplace. Its market share was 1% to 2%. *Sylvania,* 433 U.S. at 38. Philips, on the other hand, was a dominant factor in the industry, accounting for 25% to 40% of the total United States market in each of its product lines. 531 F.2d at 100, n. 15 (24a). Its restraints eliminated all competition in a substantial portion of the industry. *Sylvania* imposed no restrictions on its franchisees selling the products of competing manufacturers. 433 U.S. at 38,

n. 3. Philips did. Citing the testimony of Philips' director of marketing that ". . . we wouldn't tolerate them [the dealers] representing a competitor, the Court of Appeals held that

> [T]here is evidence that the policy of permitting PEI dealers to represent a competitor was in effect for at least a portion of the damage period. 531 F.2d at 99. (22a).

So also, Pitchford produced evidence that Philips engaged in full-line forcing and that it had been injured as a result. 531 F.2d at 101 (26a). This aggregation of trade restraints compels a finding of illegality. *Timken Roller Bearing Co. v. United States,* 341 U.S. 593, 598 (1951). No such panoply of restrictions existed in *Sylvania.*

Finally, this case was in fact tried under a rule of reason. Any suggestion to the contrary is misleading. As the District Judge stated,

> . . . the trial court permitted defendants to offer all the testimony which they desired to present in order to show that the territorial restrictions which they included in their dealer contracts were in fact reasonable, and were justified by the nature of the product, its danger to the public if not properly operated, and the need for expert service. 435 F.Supp. at 689 (61a).

Philips was not restricted; it simply failed in its proof. Its present position was rejected by the jury on special interrogatory (R. 42a), the District Judge, 435 F.Supp. at 689 (61a), and the Court of Appeals. 531 F.2d at 103-104 (31a, 33a-34a). Any fair reading of the charge (4a-11a) will show that the jury was not told that

vertical territorial restrictions, standing alone, were *per se* illegal. "*Schwinn* was mentioned only peripherally and incidentally in the charge when discussing price-fixing." 435 F.Supp. at 689, n. 8 (61a). The charge was horizontal. It was directed to price fixing and market division among competitors, both *per se* illegal (5a-11a). Had this case been tried after *Sylvania,* "the outcome would have been no different. . . ." 435 F.Supp. at 689 (61a). It was Philips that argued to the trial court that the reasonableness of the territorial restraints was for the court to determine and not the jury. (R. 51a). It should not now be heard to complain because both rejected its proof as deficient.

II. The Decisions Below Do Not Raise Any Issue Of Importance Or Precedent Which This Court Ought To Review.

The District Judge wrote two opinions. Only one, however, is the subject of the Petition. 435 F.Supp. 685 (53a). That opinion answers but one question: Is the prior opinion of the Court of Appeals inconsistent with the opinion in *Sylvania?* 435 F.Supp. at 686 (54a). Based on the particular facts of this case and the facts in *Sylvania,* the District Judge found the two to be inapposite.

It is this factual determination, affirmed without opinion by judgment order of the Court of Appeals, that Philips now seeks to have this Court review, allegedly on the basis that it is of controlling significance and great precedential import. For none of the other decisions below are appropriate subjects for review. The opinion of the Court of Appeals was the subject of an earlier petition for a writ of certiorari. The petition was denied. 426 U.S. 935 (1976). The second appeal resulted

in no opinion. It was disposed of by judgment order. (75a-76a).

The Internal Operating Procedures published by the Third Circuit provide explicit direction as to the meaning of that order. They provide, in pertinent part, that a case may be terminated by judgment order

> a. When the panel unanimously determines that a judgment of the District Court . . . should be affirmed or enforced and that a written opinion would have no precedential or institutional value; . . . 3d Cir., *Internal Operating Procedures,* p. 17 (2nd Ed. 1978).

The decision of the Court of Appeals, which Philips now contends so conflicts with other decisions as to mislead and confuse manufacturers and sellers throughout the country, is not even published. Further, as Judge Stern who sat on the panel which handed down the order has noted, the rule in the Circuit is that judgment orders are to be given no precedential weight. Stern, *The Enigma of Unpublished Opinions,* 64 A.B.A.J. 1245 (1978). There being no opinion of the Third Circuit, this case can present no conflict between circuits.

The only opinion at issue is the opinion of the District Judge. It is a purely factual determination. It has no precedential value. It affects only Pitchford and Philips. As legal authority, this case is but one of many in an unbroken line of cases establishing beyond peradventure that both price fixing and the division of markets by competitors have been and remain illegal *per se.*

CONCLUSION

The Petition for a Writ of Certiorari raises no conflict of decision or important question of federal law which calls for a determination by the Supreme Court of the United States. The decisions below were decided correctly on the basis of particular facts. They are consistent with this Court's prior holdings. Therefore, it is respectfully suggested that this Court should deny the Petition.

Respectfully submitted,

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